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THE COLLEGIUM VS NJAC DEBATE: ANALYZING INDIA'S JUDICIAL APPOINTMENT SYSTEMS

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I. ABSTRACT

The Judiciary must be encouraged to find ways and means to regulate its own affairs - consistent with the spirit of the Constitution. - Former Prime Minister of India, Dr. Manmohan Singh.

The conflict over judicial appointments in India is a longstanding issue. The original constitutional provision stated that the President appoints judges in consultation with the Chief Justice of India and other judges. However, this system evolved into the collegium system, criticized for its lack of transparency and perceived nepotism. The National Judicial Appointment Commission Act, 2014, aimed to replace the collegium with a more transparent system but was ruled unconstitutional by the Supreme Court a year after implementation. This article will analyze the historical evolution of judicial appointments in India, highlighting the issues that have emerged. It will then compare the Indian and American judicial appointment systems. Finally, the article will provide suggestions to enhance the judicial appointment process.

II. KEYWORDS:

Collegium system, National Judicial Appointments Commission, Judiciary, India, United States.

III. INTRODUCTION

There is a conflict going on in the country as to which method should be adopted for the appointment of judges. Recent events have drawn attention to the problems with the system of nominating judges and the need to make it more effective and accountable. The Union government appears to have gained the upper hand in the most recent conflict between itself and the Supreme Court. In response to the Union

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government's unwillingness to act on the Collegium's six-month-old proposal that Dr. S. Muralidhar, Chief Justice of the Orissa High Court, be appointed Chief Justice of the Madras High Court, the Collegium has now withdrawn its decision. The central government not acting on the recommendation of the collegium has its own meaning: they don't want it to happen, so they start delaying the process. Additionally, if the central government consistently rejects the recommendations of the Collegium, it can undermine the independence of the judiciary and create an environment of mistrust between the judiciary and the executive branch of the government. The collegium method, which was never mentioned in the constitution, is currently being used to appoint judges in India, which includes the four judges of the supreme court and the chief justice of India. They recommend candidates to the president of India for positions as judges of the high court and supreme court.

The existing collegium system has developed over time as a result of judicial decisions. In First Judges Case (1982)[2], the SC ruled that concurrence is not required by consultation and gave the executive the primacy. In The Second Judges Case (1993) [3]Court overturned its previous decision by redefining consultation as concurrence and held tha the CJI's advice is legally binding. The decision of the nine-judge bench reaffirmed the principle of judicial independence and the separation of powers between the judiciary and the executive branch of the Indian government. In the third judges' case (1998) [4]the court gave primacy to the opinion of the CJI in the appointment of judges.

It has been believed for a very long time that collegium system lacks transparency and accountability. To improve the system of appointing judges, the National Judicial Appointment Commission was implemented in 2014. It consists of the Chief Justice of India, two other senior judges of the Supreme Court next to the Chief Justice of India, the Union Minister of Law and Justice, and two eminent persons who are to be nominated by the Chief Justice of India, the Prime Minister of India, and the Leader of Opposition in the Lok Sabha. However, On October 16, 2015, the five-judge bench

[2] S.P. Gupta vs President of India and Ors. AIR 1982 SC 149, 1981 Supp (1) SCC 87, 1982 2 SCR 365.
[3] Supreme Court Advocates-on Record Association vs Union of India – (1993) 4 SCC 441.
[4] In re Special Reference 1 of 1998 AIR 1999 SC 1, RLW 1999 (1) SC 168.

ruled with a 4:1 majority, that the NJAC was "unconstitutional" and violated the "basic structure of the constitution" and restored the old collegium system.[5] The Supreme Court also promised that they would try to make this system more transparent and accountable by overcoming its flaws and weaknesses. But as we can see, seven years have passed, and here we are with the same old system. The objective of this study is to research and analyze the loopholes in both systems of appointments, to compare India's judicial appointment system with that of the United States, and to stress some remedies to improve the judicial appointment system. The study relied on secondary sources such as online data, books, articles, and journals.

IV. SHORTCOMINGS OF THE COLLEGIUM SYSTEM

Our government was never in favour of the collegium system because it limits the president's power in judicial appointments by requiring him to sign the recommendations made by the collegium. Also, it is not transparent that judges decide themselves who to appoint next. It is also alleged that the highest number of vacancies in the judiciary is because of the collegium, because they are the ones who decide the judges. Apart from that, one blame is that too because of collegium women, Dalits, and SC/ST representation, which is very low in the judiciary. [6]The current collegium system for the appointment of judges in India has been criticised for its lack of diversity in terms of gender, caste, and other marginalised identities. Women, Dalits, and SC/ST communities have historically been underrepresented in the judiciary, and the collegium system has not been successful in addressing this issue.

In the current collegium system, the executive branch can delay the appointments of judges recommended by the collegium by sitting on the files or seeking further clarifications. This can be used as a way to influence the collegium to recommend judges who are more favourable to the executive. The Law commission in its 230th report has addressed the issue and mentioned that "every third judge in the high

[5] Supreme Court Advocates-on-record Association & Anr. vs. Union of India (2016) 5 SCC 1, (2016) 2 SCC (LS) 253.
[6] Caste diversity at the Supreme Court (2023) Supreme Court Observer. Available at: https://www.scobserver.in/journal/caste-diversity-at-the-supreme-court/ (Accessed: 12 October 2023).

courts is a relative of judge or lawyer."[7] The collegium system is also criticized for its potential for favoritism. Since the selection process is largely subjective and based on the opinions of a small group of judges, there is a risk that some judges may be selected based on personal or political connections rather than merit. Despite these criticisms, the Collegium system has also been praised for its ability to insulate the judiciary from political interference and maintain its independence.

It is up to the Indian government and judiciary to determine whether the benefits of the collegium system outweigh its drawbacks and whether reforms are necessary to address its shortcomings.

V. THE RISE AND FALL OF NJAC

NJAC stands for the National Judicial Appointments Commission, which was introduced in India as a proposed constitutional amendment to replace the existing system of appointing judges to the higher judiciary. The NJAC was introduced in 2014 as the 99th Amendment to the Indian Constitution, and it aimed to replace the existing collegium system of judicial appointments.[8] The NJAC was introduced by the Indian government in response to concerns about the lack of transparency and accountability in the collegium system, which had been in place since the 1990s. The collegium system involved the appointment of judges to the higher judiciary by a group of senior judges of the Supreme Court and the High Courts.

The NJAC was intended to introduce a more democratic and representative system of judicial appointments, by establishing a commission comprising of the Chief Justice of India, two senior-most judges of the Supreme Court, the Union Minister of Law and Justice, and two eminent persons nominated by a committee consisting of the Prime Minister, the Leader of Opposition in the Lok Sabha, and the Chief Justice of India. The power of president has also been expanded in this omission as president can ask NJAC to reconsider the recommendation. In 2015 the SC held that legislature and executive shouldn't interfere in the process of judicial appointments and let the

[7] Law Commission 230th Report, 2012.
[8] The Constitution (Ninety ninth Amendment) Act, 2014.

judiciary works freely. The court also said that the future judges will not be able to work freely if the law minister is responsible for their appointments. Also, it will create a culture of reciprocracy.

The NJAC was seen as a potential threat to the independence and integrity of the judiciary in India. The Supreme Court of India struck down the NJAC as unconstitutional, citing concerns about the potential for political interference in the appointment of judges.[9] Justice Chelameswar dissented from the majority opinion on the grounds that the Collegium system had failed to ensure the appointment of the most suitable judges to the higher judiciary. He also criticized the opacity of the Collegium system and its lack of accountability. Justice Chelameswar held that the NJAC was a necessary reform to address these shortcomings. The Collegium system remains in place as the primary method for appointing judges to the higher judiciary in India.

VI. JUDICIAL APPOINTMENTS IN INDIA AND THE UNITED STATES

The judicial appointment systems in the United States and India differ significantly in their structures and processes. In the United States, federal judges are nominated by the President and confirmed by the Senate[10], keeping in mind political considerations, a nominee's judicial philosophy, fitness for the bench, past statements on issues relevant to the Court, and the overall balance of power between political factions[11]. while state judges are appointed by a variety of methods, including gubernatorial appointment, election, or merit selection. [12]In India, judges of the Supreme Court and High Courts are appointed by the President of India, in consultation with the Chief Justice of India and other senior judges.[13]

[9] Supreme Court Advocates-on-record Association & Anr. vs. Union of India (2016) 5 SCC 1, (2016) 2 SCC (LS) 253.
[10] The Constitution of the United States, Article II, Section 2, clause 2.
[11] Artii.s2.c2.3.5 appointments of justices to the Supreme Court. (n.d.). Retrieved April 19, 2023, from https://constitution.congress.gov/browse/essay/artII-S2-C2-3-5/ALDE_00013096/['constitution'].
[12] The Constitution of the United States, 1789, Article III, Section 1.
[13] The Constitution of India, 1950, Art. 124(2) and 217(1).

In the United States, federal judges are appointed for life, while state judges generally serve for a set term of years. [14]In India, judges of the Supreme Court serve until they reach the age of 65[15], while High Court judges retire at age 62.[16] In the United States, the President plays a significant role in the appointment of judges, as they nominate candidates for federal judgeships[17]. In India, while the President appoints judges, the role of the Executive is more limited, as the appointment is made in consultation with the Chief Justice of India and other senior judges.[18]

In the United States, the process of appointing federal judges involves a number of steps, including a background check, FBI investigation, and Senate Judiciary Committee hearing. [19]In India, the selection process involves a collegium system, where senior judges nominate and select candidates for appointment. Since the beginning of the United States history, just as the confirmation of Executive Branch officers has included political considerations, so to have nominees to the Supreme Court been accepted or rejected on political grounds.[20] For instance, the Senate rejected President George Washington's choice to replace the first Chief Justice of the Supreme Court on largely political considerations.[21] The executive branch in U.S. can also exert pressure on judges through various means, such as public criticism or political pressure, which can influence their decisions.[22]

In the United States, the appointment process is subject to significant public scrutiny, with Senate confirmation hearings and public debates about the qualifications of

[14] The Constitution of the United States, 1789, Article III, Section 1.
[15] The Constitution of India, 1950, Art. 124(2A).
[16] The Constitution (fifteenth Amendment) Act, 1963, section 4.
[17] The Constitution of the United States, Article II, Section 2, clause 2.
[18] The Constitution of India, 1950, Art. 124(2).
[19] Supreme Court appointment process: Consideration by the ... - congress. (n.d.). Retrieved April 19, 2023, from https://crsreports.congress.gov/product/pdf/R/R44236/15.
[20] HARRIS, J. O. S. E. P. H. P. pg. 303 (1953). Advice and consent of the Senate: A study of the confirmation of appointments by the United... states senate. UNIV OF CALIFORNIA PRESS.
[21] Warren, C. The Supreme Court in United States history. Little, Brown, and Company at 124–27 (1926).
[22] The United States Government. (2022, July 12). The judicial branch. The White House. Retrieved April 23, 2023, from https://www.whitehouse.gov/about-the-white-house/our-government/the-judicial-branch/

nominees. [23]In India, the appointment process is generally opaquer, with little public information about the selection criteria or the reasoning behind individual appointments. Overall, while both the United States and India have systems in place for the appointment of judges, the processes and structures are quite different, reflecting the unique political and legal contexts of each country.

VII. SUGGESTIONS FOR REFORMING JUDICIAL APPOINTMENTS

Here are several essential suggestions for enhancing the judicial appointment system in India.

1. In any democracy, transparency in the selection and appointment of judges is the cornerstone of a credible judiciary. By making the appointment process more transparent and establishing clear criteria for selection, we can ensure that the public understands the basis of these appointments. This transparency not only fosters accountability but also reduces the potential for favoritism or bias in the selection process.
2. To ensure that the judiciary is representative of the society it serves, it is crucial to involve a wider range of legal professionals in the appointment process. This diversity leads to a more balanced and equitable justice system, capable of understanding and addressing the diverse needs of the nation.
3. Vacancies and backlog of cases are pressing issues that hinder the timely delivery of justice. Implementing an expedited process to fill judicial vacancies and address case backlog is essential. By doing so, we ensure that the judiciary functions efficiently and upholds the right to a speedy trial, a fundamental right enshrined in the Indian Constitution.
4. Appointing judges based on merit and qualifications, rather than personal considerations, is the linchpin of a credible judiciary. This focus on merit ensures a more effective and credible judiciary where decisions are rooted in the law and legal principles, rather than political affiliations.

[23] Supreme Court appointment process: Consideration by the ... - congress. (n.d.). Retrieved April 19, 2023, from https://crsreports.congress.gov/product/pdf/R/R44236/15.

5. Recording collegium meetings and making transcripts public represents a significant stride toward increasing transparency and accountability in the appointment process. This action allows the public to comprehend how and why decisions are made, ensuring that appointments are made based on qualifications and performance, rather than personal connections or biases.

As India continues to evolve and grow, a reformed judicial appointment process is a key pillar in maintaining a just and equitable society. By embracing these suggestions, the nation can bolster its judiciary.

VIII. RELEVANT CASE LAWS

In ***Campaign for Judicial Accountability and Reforms v. Union of India (2017)*** [24], the Supreme Court called for greater transparency in the functioning of the collegium system and set guidelines for recording reasons for the selection and rejection of candidates for judicial appointments.

In ***National Lawyers Campaign for Judicial Transparency and Reforms v. Union of India (2019)*** [25] the constitutionality of certain provisions of the 99th Constitutional Amendment, which established a National Judicial Appointments Commission for the appointment of judges to the higher judiciary has been challenged. The Supreme Court dismissed the petition and upheld the collegium system for judicial appointments in India.

IX. CONCLUSION

In conclusion, the ongoing debate over the National Judicial Appointments Commission (NJAC) versus the collegium system in India underscores the challenges and complexities of judicial appointments in the country. The issue revolves around finding the right balance between independence and accountability in the appointment of judges. While the collegium system has faced criticism for its lack of transparency and accountability, the Supreme Court's decision to uphold it

[24] Campaign for Judicial Accountability and Reforms v. Union of India, (2018) 1 SCC 589 (India).
[25] National Lawyers' Campaign for Judicial Transparency and Reforms v. Bar Council of India, 2018 SCC Online SC 3206.

emphasizes the paramount importance of preserving the independence of the judiciary in India. The concerns about the NJAC potentially undermining this independence were significant factors in the Court's ruling. However, this does not mean that the collegium system is without its flaws. There is a pressing need for reforms to make the appointment process more transparent, accountable, and diverse, while ensuring that merit remains the guiding principle. Transparency in the selection process, broader representation, filling vacancies promptly, and a merit-based approach are essential for enhancing the credibility and effectiveness of the judiciary.

In this context, the collegium system, while imperfect, offers a more robust foundation for judicial independence. It is crucial to strike a balance between necessary reforms and safeguarding the judiciary's independence and integrity. Therefore, the collegium system should be preserved and improved upon, rather than replaced by the NJAC or another alternative. The Indian government and the judiciary must work together to address the shortcomings of the collegium system, aiming for a more transparent, diverse, and merit-based approach to judicial appointments. By doing so, they can strengthen the judiciary's credibility and ensure that it continues to uphold the principles of justice and the rule of law in India.

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